Editor's note: appealed - aff'd, Civ. No. C 80-372 K (D. Wyo. March 5, 1981), rev'd No. 81-1415 (10th Cir. Nov. 4, 1983), 720 F.2d 626; cert denied, sub nom. Easterday v. Coyer, 104 S.Ct. 2346, 466 US 972 (May 14, 1984)

DONALD W. COYER
FRED L. ENGLE, D.B.A. RESOURCE SERVICE CO., INC.,
APPELLANTS;
ALFRED L. EASTERDAY,
BUREAU OF LAND MANAGEMENT,
RESPONDENTS
(ON JUDICIAL REMAND)

IBLA 78-73, 78-409 Decided October 14, 1980

Proceeding on remand from the U.S. District Court for the District of Wyoming, following hearing and issuance of proposed findings and conclusions by Administrative Law Judge Robert W. Mesch, concerning oil and gas lease offer W 58232.

Proposed findings and conclusions adopted; Donald W. Coyer, 36 IBLA 181 (1978), and Alfred L. Easterday, 34 IBLA 195 (1978), reaffirmed.

1. Administrative Procedure: Administrative Review--Appeals--Res Judicata--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Dismissal

   Where an individual is named as an "adverse party" in a BLM decision which is favorable to that person, who then is duly served with copies of a notice of appeal and statement of reasons challenging the validity of BLM's decision before the Board of Land Appeals and seeking reversal of that decision, but decides not to participate in the appellate proceedings before the Board, the matter becomes res judicata upon the rendering of the Board's decision, and the party may not subsequently challenge this decision by filing a new appeal of his own before the Board for readjudication of the same matter.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

3. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such waiver to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and the successful drawee is required to make a showing as to sole party in interest under 43 CFR 3102.7.

4. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Filing

Where an oil and gas leasing service has an interest in the offers of its clients, and

where it files offers for multiple clients on one particular parcel, the service has increased the probability of its success in the drawing, and all of its clients' offers for that parcel must be rejected under 43 CFR 3112.5-2.

5. Equitable Adjudication: Generally--Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas Leases: Applications: Generally

The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by a State Office of BLM, of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM State Office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.

APPEARANCES: Thomas W. Ehrmann, Esq., Milwaukee, Wisconsin, for appellants; Morton J. Schmidt, Esq., Milwaukee, Wisconsin, for respondent Alfred L. Easterday; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for respondent Bureau of Land Management; Jason R. Warran, Esq., Washington, D.C., for amicus curiae Eloise B. Miller. 1/

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In Alfred L. Easterday, 34 IBLA 195 (March 22, 1978), this Board reversed a decision by the Wyoming State Office, Bureau of Land Management (BLM), which had denied the protest of Easterday 2/ against

1/ Coyer and Engle were the respondents in Alfred L. Easterday, 34 IBLA 195 (1978), and the appellants in Donald W. Coyer, 36 IBLA 181 (1978). As the parties seeking review, they are properly described as appellants herein. Easterday was the appellant in Alfred L. Easterday, supra at n.1, and the respondent in Donald W. Coyer, supra at n.1. Schmidt also apparently represents whatever interest is held by Geosearch, Inc., in this matter. (See infra at n.5.) By order dated October 22, 1979, Administrative Law Judge Mesch granted Miller leave to participate as amicus curiae, as she is involved in a different dispute involving similar issues.

2/ Easterday was the offeror whose drawing entry card was drawn with second priority in the May 1977 drawing for this parcel, designated as WY-44, in the Wyoming State Office, Bureau of Land Management (BLM).

the first-drawn simultaneous oil and gas lease offer of Donald W. Coyer, W-59232. We held that Fred Engle, d.b.a. Resource Service Co., Inc. (RSC), had an undisclosed interest in Coyer's offer when it was filed with BLM, in violation of 43 CFR 3102.7, 3/ and that Engle probably had an increased probability of participating in the proceeds from the lease owing to his having a similar interest in other offers filed for the same parcel by some 200 more of his clients, in violation of 43 CFR 3112.5-2. 4/

Engle's interest was created by the service agreement contract between him and each of his clients, including Coyer. This agreement authorized Engle to act as the client/offeror's exclusive agent for 5 years to negotiate assignment or sale of all oil and gas rights won by the client, and provided that Engle would receive a share of the proceeds of any such sale, whether or not arranged by him, as well as a share of and payments of overriding royalty retained by the client. We held in Easterday, supra, as we had held previously in Sidney Schreter, 32 IBLA 148 (1977), that this agreement gave Engle an enforceable right to a defined share of the proceeds of the lease, an "interest" as defined by 43 CFR 3100.0-5(b).

In Easterday, supra, we also held that Engle's purported "amendment and disclaimer" of this interest was a unilateral action which

---

3/ 43 CFR 3102.7 provides as follows:

"Showing as to sole party in interest.

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is canceled."

4/ 43 CFR 3112.5-2 provides as follows:

"Multiple filings.

"When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected."

was not communicated to his clients and for which no consideration was received. As such, we held, it was unenforceable and therefore ineffective to vitiate Engle's interest in Coyer's offer and in the offers of his other clients which were filed on this parcel.

Coyer was named as an adverse party by BLM in its original decision denying Easterday's protest, and he was therefore served with a copy of Easterday's notice of appeal and statement of reasons before this Board. However, he elected not to participate by filing an answer, or any other form of response. As, under our rules of procedure, the failure of an adverse party to respond to an appeal does not constitute a default, the Board proceeded to render a decision on the merits reversing BLM's decision and remanding the case for further action.

In implementing our decision in Easterday, BLM rejected Coyer's offer on April 10, 1978. Coyer then filed an appeal of that action with this Board and contemporaneously filed in the U.S. District Court for the District of Wyoming a petition for judicial review of the Easterday decision. We dismissed Coyer's appeal in Donald W. Coyer, 36 IBLA 181 (July 31, 1978), holding that, as the matter involved the identical issues, land, and parties as in Easterday, the doctrines of administrative finality and res judicata barred our adjudicating it again. We also held that our further consideration of the matter was impaired in any event by Coyer's filing his contemporaneous lawsuit with the District Court.

As the matter was before the District Court, after rendering the Coyer decision we certified the administrative record and forwarded it to BLM, which received it on August 21, 1978. At some point thereafter, the case file was misplaced and could not be presented to the District Court for review. On February 12, 1979, the Court issued an order noting that "the record is in such a state of confusion that an intelligent review is not possible," and remanding the matter to give the parties a full opportunity to present such evidence as may be relevant to their interest.

The District Court's order of February 12, 1979, remanded the matter to the Wyoming State Office, BLM, for this hearing. However, as BLM is neither staffed with any designated hearing officers who could properly conduct the sort of evidentiary proceeding contemplated by the Court, nor empowered to make findings or conclusions contrary to final decisions of the Board, and because it was the Board's decisions (not BLM's) which were at issue, on June 19, 1979, we issued an order referring the matter to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge to conduct a full evidentiary hearing, with proposed findings and conclusions to be submitted to the Board for review. On August 31, 1979, the District Court expressly affirmed this action by amending its order of February 12, nunc pro tunc, to remand the matter to the Hearings Division as provided in our June 19 order. Judge Kerr noted that

the Administrative Law Judge should resolve issues relating to the lost administrative record and make provision for the authentication of a reconstructed record.

On September 10, 1979, Administrative Law Judge Robert W. Mesch directed the parties to file statements detailing the issues presented, and scheduled a prehearing conference, which was held on October 12, 1979, in Cheyenne, Wyoming. 5/ Subsequently, the parties clarified the matters in issue and began their effort to reconstruct the administrative record.

The hearing before Judge Mesch was held on February 14, 1980, in Denver, Colorado. At this hearing, BLM introduced into evidence the misplaced administrative record concerning this lease offer, containing the official, original record up to the time it was certified by the Board. We have scrutinized this record and found that it is the complete, original file, and that nothing has been added to it.

Following his consideration of the administrative record, and the other evidence educed at the hearing, Judge Mesch issued Proposed Findings and Conclusions on July 14, 1980, and submitted them, along with the case record, to this Board. We have reviewed these findings and concluded that they should be adopted in full.

[1] Engle's and Coyer's effort to appeal the rejection of Coyer's offer pursuant to this Board's decision in Easterday was barred by his failure to participate in the review procedure when this matter was properly before the Board. Coyer was named as an "adverse party" in BLM's decision rejecting Easterday's protest. As such, he was entitled to receive copies of any notice of appeal and supporting statement of reasons filed by Easterday, in order to allow him the opportunity to defend his interests by filing an answer to this appeal. 43 CFR 4.413, 414. The record shows that Easterday served these documents on Coyer as required, and Engle and Coyer knew that the validity of Coyer's offer was being litigated before the Board pursuant to Easterday's appeal. Before Judge Mesch, Engle and Coyer

5/ Although Geosearch, Inc., never petitioned to intervene in the administrative proceedings concerning this lease offer, it nevertheless filed a prehearing statement with Judge Mesch. Geosearch had petitioned to intervene in the judicial proceedings in the District Court, asserting that it had acquired a 25 percent interest in Easterday's offer. However, this assertion was never proven, as the Court remanded the matter without ruling on Geosearch's petition. At the prehearing conference, Morton J. Schmidt, Esq., counsel for respondent Easterday indicated that he was authorized to represent whatever interest Geosearch might have (Prehearing Conf. Tr. 3-5). Accordingly, we recognize Schmidt in this capacity without finding that Geosearch has any cognizable interest in this lease offer.

admitted that they knew so, explaining that they deliberately did not participate because they were sure that they would prevail on appeal (Pr. Find. & Concl. at 10-11). Had Engle and Coyer simply filed an answer to Easterday's appeal, they would have been entitled to participate in the proceeding with full status as parties, including the right to request an evidentiary hearing per 43 CFR 4.415. However, having failed to participate in Easterday's appeal, Coyer may not attack the results of this appeal by filing a new appeal of his own to this Board, as the matter is res judicata. Donald W. Coyer, supra.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction and Mining Co., 384 U.S. 394, 422 (1966). It is appropriate to apply res judicata to bar a suit for judicial review of an agency decision by the affected person, where he has been given an opportunity to challenge the decision within the agency's appellate framework but has elected not to exercise this opportunity by taking an appeal. A. Duda & Sons Cooperative Ass'n., v. United States, 495 F.2d 193 (5th Cir. 1974); see Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971). Coyer and Engle were given the opportunity to litigate the validity of Coyer's offer by participating in the quasi-judicial appellate proceeding initiated by Easterday, and knowingly and deliberately elected to forego this right, thus rendering our decision in Easterday final and barring a collateral attack on its efficacy. 6/

[2, 3, 4] In any event, Coyer's and Engle's attack on the validity of our decision in Easterday fails on its merits. The service agreement between them gave Engle an "interest" in Coyer's offer. 7/ This interest was not abrogated by Engle's subsequent

---

6/ Moreover, Engle has also had a full opportunity to litigate the same issues presented in this case in a separate administrative proceeding concerning the offer of Frederick W. Lowey, another of his clients, which was filed in the New Mexico State Office, BLM. Lowey's appeal, in which Engle appeared as a party, raised the same issues as did Coyer's and was decided against him. Thus, Engle is involved in his third opportunity to litigate these same issues before the Board.

7/ Pr. Finds. & Concls. at 4; 43 CFR 3100.0-5(b); Frederick W. Lowey, 40 IBLA 381, 383 (1979); Alfred L. Easterday, supra at 198; Sidney H. Schreter, 32 IBLA 148 (1977); Lola I. Doe, 31 IBLA 394 (1977); see also Order Remanding Appeal to Wyoming State Office, Coyer v. Andrus, No. C78-104K (D. Wyo. Feb. 12, 1979), containing the finding that the following facts are not in dispute: "Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations (Lola Doe, 31 IBLA 394, August 19, 1977 and Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148, September 12 1977)."

attempt to unilaterally disclaim it, as Engle did not communicate this putative waiver to Easterday or receive any consideration from him to bind the contract. 8/ Coyer failed to disclose this interest at the time the offer was made as required by 43 CFR 3102.7, and his offer must therefore be rejected because it violates this regulation. 9/ Moreover, numerous other offers in which Engle had a similar interest were apparently filed for this parcel, thus increasing Engle's chances of success in violation of 43 CFR 3112.5-2, under which all such offers, including Coyer's, must be rejected. 10/

[5] Finally, the Department is not estopped from rejecting Coyer's offer on account of the "understanding" between Engle and employees of the Wyoming State Office in connection with the filing of the putative waiver. The Departmental regulation is explicit on this question: "The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." 43 CFR 1810.3(b). It is this Board, as the representative of the Secretary of the Interior, which decides what Departmental regulations and other provisions of law sanction or permit as fully and finally as might the Secretary himself, in Departmental disputes concerning the public lands. 43 CFR 4.1(b)(3). Thus, when a representative of BLM enters into any agreement, it is subject to review by the Secretary, through this Board, and, if improper, it is without effect, regardless of whether or not a party may have relied on the forming of the agreement. To allow subordinate officials to enter into binding agreements would empower them to take actions immune from review by the Department and would effectively undermine the supervisory power of the Secretary to make and enforce policy in the Department, or to correct the errors of subordinates. This principle is in accord with judicial determinations regarding estoppel, which require, inter alia, that the party seeking estoppel must have had a reasonable right to rely on a misrepresentation by Government agents. 11/ As the regulation (id.) so states unequivocally, it is a matter of record that BLM

8/ Pr. Finds. & Concls. at 4-5; Frederick W. Lowey, supra at 384-392; Alfred L. Easterday, supra at 199.

9/ Pr. Finds. & Concls. at 6; Frederick W. Lowey, supra at 390; Alfred L. Easterday, supra at 200; see also District Court's order of Feb. 12, 1979, quoted above at n. 7.

10/ Pr. Finds. & Concls. at 12-13; Alfred L. Easterday, supra at 200.

11/ An analysis of the operation of estoppel against the Government is contained in the judicial opinions delivered in the cases of United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 324 F. Supp 698 (D. Idaho 1971), aff'd, 481 F.2d 985 (9th Cir. 1973); and United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). Under these holdings, in order for estoppel to lie against the Government, inter alia, the individual asserting estoppel must have

State officials do not have final authority in the Department, and that, to the contrary, their rulings are subject to protest and appeal procedures. As all citizens are charged with the responsibility of being familiar with applicable regulations (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)), Engle had constructive notice that BLM's accommodation did not bind the Department.

Furthermore, Judge Mesch has found that Engle had actual knowledge that the Wyoming State Office, BLM, could not speak for the Department. 12/ Thus, it is clear that Engle could not reasonably have relied in good faith on the finality of the arrangement made with the Wyoming State Office. Rather, Engle knew (and the regulation made clear) that BLM's decision to accept the disclaimer was subject to protest and review at the Secretarial level, which review might result in reversal of this decision.

Accordingly, we find that the Department is not estopped to reject Coyer's lease offer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are sustained.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

fn. 11 (continued)
relied to his detriment on misinformation received on account of some affirmative misconduct by Government agents acting within the scope of their authority, on which misinformation the party had a reasonable right to rely. United States v. Joseph Larsen, 36 IBLA 130 (1978).

12/ Judge Mesch found that Engle's "amendment and disclaimer" itself contains recitals demonstrating that Engle clearly recognized that the Wyoming State Office did not speak for the Department, which recitals belie Engle's assertions to the contrary (Pr. Finds. & Concls. at 7).

July 14, 1980

DONALD W. COYER and FRED L. ENGLE, d/b/a RESOURCE SERVICE COMPANY,	:	IBLA 78-73	34 IBLA 195
	:	IBLA 78-409	36 IBLA 181
Appellants	:	Oil and Gas Lease	
v.	:	Proceeding on Remand	
BUREAU OF LAND MANAGEMENT and ALFRED L. EASTERDAY,	:		
Respondents	:		

PROPOSED FINDINGS AND CONCLUSIONS

Appearances: Thomas W. Ehrmann, Wayne E. Babler, Jr., Ross R. Kinney and William R. Hamm of Quarles & Brady, Milwaukee, Wisconsin, for appellants;

Harold J. Baer, Jr., Office of the Solicitor, Department of the Interior, Denver, Colorado, for respondent, Bureau of Land Management;

Morton J. Schmidt of Morton J. Schmidt & Associates, Ltd., Milwaukee, Wisconsin, for respondent, Alfred L. Easterday;

Jason R. Warran of McDade and Lee, Washington, D.C., for amicus curiae, Eloise B. Miller;

Before: Administrative Law Judge Mesch.

In May, 1977, the Wyoming State Office of the Bureau of Land Management conducted its regular monthly drawing of simultaneously filed oil and gas lease offers. The drawing entry card offer of Donald W. Coyer was drawn first for parcel No. 44, and the card filed by Alfred L. Easterday was drawn second. As a result of the drawing, Coyer was entitled to receive a lease, W 59232, covering parcel No. 44 if he was a qualified offeror.

Easterday filed a protest with the Wyoming State Office against the issuance of the lease to Coyer. Easterday contended that Coyer was not a qualified offeror because he had an agreement with a leasing service operated by Fred L. Engle, doing business as Resource Service Company, that invested Engle with an undisclosed interest in the offer and the lease if issued.

By a decision dated October 25, 1977, the Wyoming State Office dismissed Easterday's protest. In its decision, the Wyoming State Office recognized that there was a service agreement between Coyer and Engle that created an undisclosed interest in Engle in Coyer's offer. The decision concluded, however, that the objectionable provisions of the service agreement were of no effect because Engle had submitted an amendment and disclaimer document by which he waived, and agreed he would not enforce, his rights under the service agreement.

Easterday appealed to the Interior Board of Land Appeals. Coyer did not participate in the proceedings on appeal. In Alfred L. Easterday, 34 IBLA 195 (March 22, 1978), the Board held (1) that Engle's service agreement gave Engle an interest in Coyer's offer within the meaning of 43 CFR 3100.0-5(b) because he had an enforceable right to share in the profits of any sale of any lease obtained by Coyer; (2) that Engle's amendment and disclaimer document was ineffective as a matter of law because there was no notice to or agreement with Coyer prior to the drawing and there was no consideration given to Engle for his forbearance from enforcing his contractual rights; (3) that Coyer's offer violated 43 CFR 3102.7, which required a timely disclosure of Engle's interest in the offer; and (4) that there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because Engle may have represented some 200 other client-offerors under similar service agreements in the drawing for parcel No. 44.

On April 10, 1978, the Wyoming State Office issued a decision rejecting Coyer's lease offer. Coyer filed an appeal to the Board of Land Appeals. Easterday participated in the proceedings on appeal. In Coyer v. Easterday, 36 IBLA 181 (July 31, 1978), the Board dismissed Coyer's appeal on the ground of res judicata stating, "Coyer's appeal is, in effect, an appeal of the decision of this Board in Easterday, involving the same parties, the same events, the same lease, and is before the same tribunal"

Coyer and Engle sought judicial review of the Board's decisions. On February 12, 1979, the United States District Court for the District of Wyoming issued an order in Coyer, et al. v. Andrus, et al., Civil No. C 78-104, remanding the matter for a redetermination of the rights of the parties.

By an order dated June 19, 1979, the Board of Land Appeals referred the matter for assignment to an administrative law judge to "conduct a hearing pursuant to 43 CFR 4.415 for the reception of evidence on any relevant issues of disputed fact, and to hear all arguments of fact and law". The Board also directed the administrative law judge to make proposed findings and conclusions for submission to the Board in accordance with 43 CFR 4.433. In its order, the Board stated that "the plaintiffs to the judicial litigation will be required to plead and prove reversible error in the decisions rendered by this Board in disposing of the respective appeals of Easterday and Coyer".

A hearing was held on February 14, 1980, in Denver, Colorado. The parties and the amicus curiae have submitted proposed findings and conclusions and supporting briefs.

Coyer and Engle do not challenge the Board's determination that the service agreement used by Engle created an interest in Engle in Coyer's lease offer. They contend that Engle reached an agreement with personnel of the Wyoming State Office to the effect that Engle's amendment and disclaimer eradicated the prohibited interest from his service contracts, and the agreement with the State Office employees should be given legal effect and enforced because (1) Federal regulatory policies will not be prejudiced and will actually be promoted by giving effect to the agreement; (2) the regulations and adjudicatory precedents do not specify how forbidden interests can be eradicated and any reasonable means agreed to between the holders of the interest and a representative of the Bureau of Land Management should be enforced under established principles relating to (a) agreements made by governmental entities in carrying out proprietary functions, (b) equitable estoppel, (c) retroactive application of new legal rules, and (d) apparent authority of government representatives in the course of carrying out proprietary functions; and (3) the amendment and disclaimer method of eradicating the prohibited interest has a solid base in the common law doctrine of waiver.

Easterday and the Bureau dispute the claimed effect of Engle's amendment and disclaimer, the claimed effect of any agreement between Engle and employees of the Wyoming State Office, and the validity of the legal conclusions advanced by Coyer and Engle. Among other things, they assert (1) that any agreement between Engle and employees of the Wyoming State Office cannot be given legal effect and enforced because this would permit employees of the state office to immunize a decision of that office from review by higher authority and effectively nullify Easterday's right to appeal the state office decision of October 25, 1977, which is granted by the Department under 43 CFR 4.410; (2) that Coyer and Engle are precluded from litigating any issues relating to any agreement between Engle and employees of the Wyoming State Office because Coyer had the opportunity and did

not present such issues to the Board of Land Appeals on Easterday's appeal from the Wyoming State Office decision of October 25, 1977, and they cannot now present new theories designed to alter the results of the previous adjudication; (3) that Engle is precluded from litigating the effect of the amendment and disclaimer and any agreement reached with employees of the Wyoming State Office because he has already litigated the issues in another case decided by the Board, i.e., Frederick W. Lowey, et al., 40 IBLA 381 (May 14, 1979); and (4) that Coyer and Engle have not shown reversible error in the decisions of the Board, as required by the Board's order for a hearing in this proceeding.

The history of this case, pertinent regulations, the relevant evidence presented at the hearing, and other matters either agreed to or undisputed are summarized in an attached appendix. That summary supports and dictates the following findings and conclusions:

1. The service agreement executed by Coyer on January 4, 1977, and used by Engle in filing Coyer's drawing entry card offer in the May 1977 drawing, authorized Engle to act, for a period of five years, as Coyer's sole and exclusive agent to negotiate the sale of any rights obtained by Coyer in the drawing. It further provided that, upon the consummation of a sale, Engle would receive for his services a percentage of the cash price paid to Coyer and a percentage of any royalty payments made to Coyer. Under the service agreement, Engle had an interest in Coyer's offer as that term is defined in 43 CFR 3100.0-5(b) and illustrated in 43 CFR 3112.5-2.

2. By the amendment and disclaimer document executed by Engle on January 13, 1977, Engle waived and renounced, subject to a condition subsequent, the exclusive agency in his service agreements with his clients. Engle's attempt to amend, disclaim, waive or renounce the exclusive agency provisions of his service agreements would, if effective, have modified his contracts with his clients by eliminating (a) the authorization granted by his clients and Engle's obligation to act as their sole and exclusive agent in negotiating the sale of any rights obtained in a drawing; (b) the fixed percentage shares agreed upon for successfully negotiating a sale of any rights obtained in a drawing; and (c) Engle's obligation, if the client did not receive at least $10,000.00 for the sale of any rights, to process up to 300 additional lease applications for the client without any service fees.

3. Engle's conditional amendment, disclaimer, waiver or renunciation was not communicated to Coyer prior to the May 1977 drawing. There was no mutual assent or meeting of the minds between Engle and Coyer prior to the drawing relating to Engle's attempted modification of his service agreement with Coyer.

There was no consideration to support the attempted modification of the contract. Engle's unilateral attempt to modify his contract with Coyer was ineffective as a matter of fundamental contract law. 17 Am. Jur. 2d, Contracts § 465. Accordingly, Engle's amendment and disclaimer did not eradicate the interest he held in Coyer's offer at the time of the drawing.

4. In January of 1977, Engle and his then attorney reached an understanding with employees of the Wyoming State Office under which the employees of that office agreed, insofar as that office was concerned and during an interim appeal period only, to (a) accept the amendment and disclaimer procedure proposed by Engle and his attorney as effectively eradicating the interests held by Engle in his clients' lease offers under his service agreements; and (b) take no action on their own initiative, if agreed procedures were followed, in rejecting any of Engle's clients' offers. No legal theory has been presented, and none is apparent, that would support the conclusion that Engle's agreement with employees of the Wyoming State Office supplied the legal deficiencies in Engle's unilateral attempt to modify his service contracts with his clients and, as a result, rendered the amendment and disclaimer effective as a modification of the basic provisions of the service agreements. The understanding or agreement reached between Engle and employees of the Wyoming State Office did not operate to eradicate Engle's interest in Coyer's offer.

5. The Department of the Interior follows specific adjudication and appellate procedures in its administration of the public lands. Each state office of the Bureau of Land Management makes the initial determination with respect to lands within its area of jurisdiction. Any party who is adversely affected by a decision of an officer of the Bureau of Land Management has an absolute right of appeal to the Board of Land Appeals. 43 CFR 4.410. The "Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources". 43 CFR 4.1(b)(3). Employees of a state office of the Bureau cannot effectively prejudge a case by agreement or otherwise and thereby immunize a decision of that office from independent review by the Board. The agreement reached between Engle and employees of the Wyoming State Office and any representations made by those employees as to the action they would take with respect to offers filed by Engle under his service agreement and the amendment and disclaimer document were not binding on and had no legal effect insofar as the Board of Land Appeals is concerned. Easterday, as a party adversely affected by the decision of the Wyoming State Office in rejecting his protest to the issuance of a lease to Coyer, had the right of appeal and the right to have the Board consider the case on its merits free from any legal conclusions reached by employees of the Wyoming State Office. Engle and his attorney

knew, or should have known, of the established adjudication and appellate procedures followed by the Department.

6. There was a violation of 43 CFR 3102.7 because Engle's interest in Coyer's lease offer arising from his service agreement with Coyer was not disclosed to the Wyoming State Office and the required documents and signatures of Engle and Coyer were not filed with that office.

7. There is no merit to the appellants' argument that the amendment and disclaimer procedure proposed by Engle and his attorney, and the agreement reached with employees of the Wyoming State Office pursuant thereto, should as a matter of Federal policy be held to have the intended effect because Federal regulatory policies will not be prejudiced, but will be promoted. Engle's unilateral amendment and disclaimer, which in effect amounted to an attempt to modify and change the basic provisions of his service contracts with his clients, was made without any consideration and without any notification to or agreement with his clients. It was ineffective as a matter of law; was not made effective by Engle's agreement with employees of the Wyoming State Office; and was subject to revocation or rescission at Engle's option. If a client, after winning a lease in a drawing and then being informed for the first time of the amendment and disclaimer and the agreement with the Wyoming State Office, refused to execute a new service agreement with Engle and sold the lease to a bona fide purchaser, Engle could then revoke or rescind the amendment and disclaimer and demand his share of the proceeds called for under the original service agreement. To give effect to such an arrangement would establish a precedent that would allow open flaunting of the prohibition against multiple filings and foreclose the Department from preventing flagrant abuses of the drawing-lottery system. The Department could not, under such circumstances, effectively insure that there were no hidden interests in other parties' lease offers and that one party did not have more than one chance of obtaining an interest in a lease in a drawing.

8. There is no merit to the appellants' argument that since Federal regulations and existing adjudicatory precedents do not specify how forbidden interests relating to leases of public land can be eradicated, any reasonable means agreed to between the holder of the interests and a representative of the Bureau of Land Management should be given legal effect. There is no reason why the regulations or adjudicatory precedents should so specify. The regulations are abundantly clear in defining forbidden interests and there is no justifiable reason for such interests to exist. If they do arise, they can readily and easily be eliminated by a party interested in following fundamental and established legal precedents rather than concocting a procedure calculated (a) to maintain a viable leasing service business, and (b) to minimize the chances of being foreclosed

from sharing in any profits that might be obtained from a lease. Any "reasonable means" agreed to between the holder of a forbidden interest and a representative of the Bureau of Land Management cannot automatically and as a general proposition be given legal effect because (a) under existing regulatory procedures no representative of the Bureau of Land Management can enter into a binding agreement that would nullify the Department's adjudication and appellate procedures; and (b) the Secretary of the Interior could not properly discharge his duties as guardian of the public lands if he was compelled to either (i) promulgate regulations covering every conceivable (and undreamed of) legal problem that might arise in the management, use and disposition of the public lands or (ii) suffer the consequences of local employees in the various state offices of the Bureau entering into agreements that would bind him in the administration of the multitude of public land laws. In any event, the approach agreed to between Engle and employees of the Wyoming State Office was not a reasonable means because, as a matter of basic contract law, it did not eradicate the forbidden interest and, if adopted, would prevent the Department from maintaining the integrity of its drawing-lottery system.

9. There is no merit to the appellants' arguments that enforcement of such agreements is a fair and reasonable method of resolving such regulatory gaps and the principal (a) draws sustenance from established principles governing agreements entered into and promises made by governmental entities in the course of carrying out their proprietary functions; (b) is supported by the principle of equitable estoppel; (c) draws sustenance from the principle relating to retroactive application of new legal rules; and (d) draws sustenance from the principle of apparent authority.

> a. Entering into a lease agreement involving public lands with a private citizen, does not, as contended by the appellants, fall squarely within the proprietary sphere where governments have been held to their agreements and estopped from taking a contrary position. Transactions of the United States relating to the management, use and disposition of public lands and their resources are for the benefit of all the people and are considered a governmental rather than proprietary function. Utah Power & Light Company v. United States, 243 U.S. 389 (1917); United States v. California, 332 U.S. 19 (1947); United States v. State of Florida, 482 F.2d 205 (5th Cir. 1973).
>
> b. The doctrine of equitable estoppel does not bind the Secretary of the Interior or the United States to the agreement reached between Engle and employees of the Wyoming State Office. The principal case relied on

by the appellants, United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), outlines the test of equitable estoppel as: (i) the party to be estopped must know the facts; (ii) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (iii) the latter must be ignorant of the true facts; and (iv) he must rely on the former's conduct to his injury.

> i. Contrary to the appellants' assertion, the employees of the Wyoming State Office did not know, and could not have known, what would be sufficient to eradicate the objectionable provisions of the service agreement. The only thing they knew in this regard is what, in their opinion, would be sufficient to accomplish the eradication. There is no evidence suggesting that the employees of the Wyoming State Office ever represented affirmatively that either the Secretary of the Interior (through his delegate the Board of Land Appeals) or any other Bureau state office would be bound by their interpretation of the legal effectiveness of the amendment and disclaimer. The employees of the Wyoming State Office did not represent, did not purport to represent, and could not speak for any office other than their own. They were not in any position to know, did not purport to know, and could not have known, what the Board of Land Appeals or any other Bureau state office would conclude as to the legal effectiveness of the amendment and disclaimer. They could not, and did not purport to, bind the Secretary of the Interior or his delegates to a determination as to what would be sufficient to eradicate the forbidden interest. They could not, and did not purport to, nullify the Department's adjudication and appellate procedures.
>
> ii. The only thing Engle and his attorney had a right to believe was that the Wyoming State Office would not on its own initiative, and during an interim appeal period, take any action to reject any of Engle's clients' lease offers if agreed procedures were followed. The employees of the Wyoming State Office simply attempted to make a temporary accommodation that would permit

Engle's leasing service business to continue without interruption pending appellate and possibly judicial review. They warned Engle and his attorney that the accommodation was risky and they did not know, and could not determine, what the Department or any other Bureau office would conclude as to the effect of the amendment and disclaimer.

iii. Engle and his attorney were not, or should not have been, ignorant of the true facts. There was no reasonable basis for Engle or his attorney to suppose (a) that the employees of the Wyoming State Office represented or spoke for any office other than their own; (b) that the employees knew, or could have known, what the Board of Land Appeals or any other Bureau state office would conclude as to the legal effectiveness of the amendment and disclaimer; (c) that the Secretary of the Interior or his delegates would be bound by the interpretation of local employees of the Bureau as to the legal effectiveness of the amendment and disclaimer; and (d) that the local employees of the Bureau could nullify and render completely meaningless the Department's adjudication and appellate procedures.

iv. Engle and his attorney were fully informed, or should have been aware, of every aspect of the matter. They were advised of, and had, other alternatives to the conditional amendment and disclaimer procedure concocted and proposed to the Wyoming State Office. Engle could have continued to use the existing service agreement and simply disclosed his interest in his clients' lease offers in accordance with 43 CFR 3102.7. He chose not to follow this procedure because this would foreclose him from representing more than one client in a drawing for the same parcel of land. Engle could have adopted a new service agreement eliminating the prohibited interest. He chose not to follow this procedure because of the "horrendous" amount of paperwork involved with some 4,000 to 6,000 existing clients. In addition, such a procedure would undoubtedly have created problems in obtaining an exclusive agency agreement after a drawing that could be avoided or minimized

> under the amendment and disclaimer procedure. If Engle had had any interest in anything other than reaching an agreement under which his leasing service business would remain viable and he would minimize the chances of being foreclosed from sharing in any profits that might be obtained from a lease, then he would not have refused to take the courses suggested by the Wyoming State Office which would have extricated him and his clients from the difficulty created by the prohibited interest.

c. There is no retroactive application of a new legal rule involved in this proceeding. There was no old rule, regulation, or authoritative pronouncement that the amendment and disclaimer procedure proposed by Engle and his attorney would be an effective means of eliminating the prohibited interest. An agreement reached with employees of a local Bureau of Land Management office does not constitute a legal rule that cannot be changed by the Department except by prospective application. A contrary conclusion would render the Department's adjudication and appellate procedures meaningless and make it impossible for the Secretary to properly discharge his duties and obligations as guardian of the public lands. There was a new legal rule, but only in the sense that any determination on a question of first impression by the Department or the Courts creates a new legal rule. The ruling on the effect of the amendment and disclaimer was a necessary consequence of the Department's adjudication and appellate procedures and Easterday's appeal from the Wyoming State Office decision rejecting his protest to the issuance of a lease to Coyer.

d. The principle of apparent authority, which is the power to bind a principal, which the principal has not actually granted, but which he leads persons with whom his agent deals to believe that he has granted to the agent, is not applicable in this proceeding. As the appellants recognize, the principle applies to a governmental entity only when government employees are acting in the course of carrying out proprietary functions. A proprietary function is not involved in this case. In addition, neither the Department of the Interior nor the Bureau of Land Management did anything that would have led Engle to believe, and a man of ordinary prudence, diligence, and discretion would not have had a right to believe, and would not have actually believed, that the employees of the Wyoming State Office possessed the authority and purported to

act for any office other than their own. The Department's adjudication and appellate procedures set forth in 43 CFR Part 4, which Engle and his attorney were, or should have been, familiar with at the time, would, without considering anything more, have been sufficient to dispel any idea that employees of the Wyoming State Office had authority to bind the Bureau or the Department.

10. There is no merit to the appellants' arguments that, in any event, Engle's amendment and disclaimer effectively operated as a waiver or relinquishment of his interests in his clients' lease offers; that when the amendment and disclaimer document was executed Engle was powerless to later assert his rights without the consent of his clients; and that consideration, communication, and agreements with his clients were unnecessary. Engle's unilateral and conditional attempt to amend, disclaim, waive or renounce the exclusive agency provisions of his service agreements was not a waiver, as that term has variously and loosely been construed. It was an attempt to modify and change the basic provisions of his service agreements with his clients and, as such, it was not effective without consideration and mutual assent. In any event, if Engle's amendment and disclaimer document can be construed as a waiver, rather than a modification of his service contracts, the law that would apply is that set forth in the decisions of the Board of Land Appeals in the Easterday case and the Lowey case and not that set forth in the appellants' brief. The authoritative treatises cited by the Board, Williston on Contracts, Third Edition, § 689 (1961), § 690 (1961), § 1820 (1972); 3A Corbin, Contracts § 752 (1960); 5A Corbin, Contracts, § 1238 (1964), state that waivers are not effective and can be rescinded at will in the absence of consideration or justifiable reliance. There was no consideration here, and there could not have been any reliance because Coyer was not aware of the alleged waiver, which was subject to a condition subsequent, prior to the drawing.

11. When the Wyoming State Office issued its decision rejecting Easterday's protest against the issuance of a lease to Coyer, Easterday filed an appeal pursuant to 43 CFR 4.410. He served Coyer with copies of all documents filed in connection with the appeal, as required by 43 CFR 4.413. Coyer did not participate, either individually or through Engle, in the proceedings on appeal to the Board of Land Appeals. Coyer (and through him, Engle) had the right and opportunity to participate in the appeal under 43 CFR 4.414. Coyer and Engle should be precluded under fundamental principles relating to exhaustion of administrative remedies from (a) obtaining any relief from or any reconsideration of the Board's decision in the Easterday case; and (b) from presenting new theories which were not litigated before the Board in the Easterday case, i.e., issues relating to the agreement between Engle and employees of the Wyoming State

Office concerning Engle's amendment and disclaimer, in an effort to alter the results of the Board's decision in the Easterday case. St. Regis Paper Co. v. Marshall, 591 F.2d 612 (10th Cir. 1979).

12. Engle litigated the effect of the amendment and disclaimer and the agreement with employees of the Wyoming State Office in another case decided by the Board, i.e., Frederick W. Lowey, et al., supra. He should now be precluded from again litigating the same issues or new issues relating to the same subject matter.

13. The appellants did not prove, as required by the Board's order for a hearing in this proceeding, reversible error in the rulings of the Board in its Easterday decision that (a) Engle's service agreement gave Engle an interest in Coyer's offer within the meaning of 43 CFR 3100.0-5(b); (b) Engle's alleged waiver or disclaimer of that interest was ineffective as a matter of law; (c) Coyer's offer violated 43 CFR 3102.7, which required a timely disclosure of Engle's interest in the offer; and (d) there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because Engle may have represented some 200 other client-offerors under similar service agreements in the drawing for parcel No. 44. No satisfactory evidence was presented as to whether Engle did or did not, in fact, represent other client-offerors under his standard form service agreement in the drawing for parcel No. 44. Engle could have presented evidence on this question sufficient to support a specific finding. He did not, but simply testified that he assumed he had filed for more than one client in the drawing.

14. The appellants did not prove reversible error in the ruling of the Board in its decision in Coyer v. Easterday, supra, that Coyer was barred under the principal of res judicata from litigating any issues that were or could have been presented to the Board in its consideration of Easterday's appeal.

For the reasons stated, Coyer's offer should be rejected and the lease issued to Easterday if he was a qualified offeror.

Robert W. Mesch
Administrative Law Judge

APPENDIX

Fred L. Engle, doing business as Resource Service Company, is, and has been since November of 1973, engaged in soliciting individuals to participate in the monthly simultaneous oil and gas lease drawings conducted by the various state offices of the Bureau of Land Management. (Tr. 58-61). A brochure that he distributed contains the following, among other, enticements:

> Newspaper Zone Manager from Ogden, Iowa won the oil and gas lease rights to a 1,264 acre parcel of government land that immediately sold for $265,505 plus a 5% overriding royalty on all future oil and gas production. If exploration proves fruitful, our client could realistically become a millionaire without any additional investment on his part. (Appellants' Ex. No. 31)

From the inception of his business until early 1978, Engle used a standard form agreement, captioned "Service Agreement", in filing drawing entry card offers for clients. (Tr. 60). Under the agreement, the client submitted to Engle the filing fees required by the Bureau of Land Management and service fees covering Engle's services in connection with each drawing. Engle was authorized to select parcels of land for filing and to complete and file drawing entry card offers for the clients. The agreement also authorized Engle to act, for a period of five years, as the sole and exclusive agent for the client in negotiating the sublease, assignment or sale of any rights the client obtained by reason of being successful in a drawing. It provided that if a sale, assignment or sublease was negotiated, either by Engle or the client during the five-year period of the agency, Engle would share on a percentage basis in any cash price paid to the client and if royalty payments were made Engle would share on a percentage basis in such payments. Any final negotiated price was subject to the clients' approval. The agreement also provided that if the client did not receive at least $10,000 gross in aggregate on the outright sale of a lease, Engle would process up to 300 additional lease applications free of service fees. Engle was authorized to handle all of the client's correspondence at his address. (Appellants' Ex. No. 1). Engle did not submit the agreement or otherwise apprise the various state offices of the Bureau that such an agreement existed when filing drawing entry card offers for clients.

In December of 1976, Engle's service agreement was brought to the attention of employees of the Wyoming State Office of the Bureau. As a result, that office issued decisions rejecting three simultaneously filed oil and gas lease offers of Engle's clients, i.e., Lola I. Doe, Sidney H. Schreter, and William F. Wopp, Jr., that had been drawn first for three parcels in the

November 1976 drawing. The state office decisions held that (1) Engle's service agreement gave Engle an interest in his clients' lease offers within the meaning of 43 CFR 3100.0-5(b) by reason of the exclusive agency provision and the right to share in the profits from the sale of a lease; (2) there was a violation of 43 CFR 3102.7 because Engle's interest in the offer was not disclosed; and (3) there was a violation of 43 CFR 3112.5-2 because Engle had the same interest in more than one clients' lease offer submitted for the same parcel. (Appellants' Ex. No. 28, pp. 59-60).

The regulations relied on by the Wyoming State Office provide in part:

> 43 CFR 3100.0-5(b) * * * An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.
>
> 43 CFR 3102.7 * * * If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer.
>
> 43 CFR 3112.5-2 * * * Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one

> offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected.

Engle appealed the decisions of the Wyoming State Office, not in his name, but, in the names of his clients. The appeals were taken pursuant to 43 CFR 4.410 which provides that "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board [of Land Appeals]". (Tr. 150-151).

When Engle became aware of the position taken by the Wyoming State Office in its rejection decisions, he and his then attorney, Harry W. Theuerkauf, contacted the Wyoming State Office in an attempt to find a way to avoid the risk of future disqualifications of winning clients pending appellate and possibly judicial review of the Wyoming State Office's rejection decisions. They were referred to John D. Erdmann, a Paralegal Specialist working in the Oil and Gas Section of the Branch of Lands and Minerals Operations of the Division of Technical Services in the Wyoming State Office. Engle and Theuerkauf reached an understanding with Erdmann, which was concurred in by Harold G. Stinchcomb, Chief, Branch of Lands and Minerals Operations, and Glenna M. Lane, Chief, Oil and Gas Section, that Engle could continue to use his standard form service agreement, as to both existing and new clients, pending appellate and possibly judicial review and the Wyoming State Office would not disqualify any winning clients if (1) Engle filed a document drafted by his attorney designated "Amendment and Disclaimer" with the Wyoming State Office; (2) Engle notified each successful client, after the drawing, of the disclaimer and of the clients being free to either enter into a new service agreement with Engle or to decline to do so and be under no further obligation; and (3) Engle provided the Wyoming State Office with information sufficient to enable it to satisfactorily monitor Engle's adherence to the understanding. (Appellants' Ex. No. 28, pp. 60, 69-85, 90-91, 115-118, 121-123).

Engle did not want to revise his standard form service agreement because of his uncertainty as to whether the position of the Wyoming State Office that the agreement gave Engle an interest in his clients' lease offers would be sustained on appeal and because of problems posed by the large number of clients (between 4,000 and 6,000) that Engle had at the time. (Appellants'

Ex. No. 25, pp. 9, 12-13). He did not want to avoid the problem created by his service agreement by disclosing his interest and filing the statements and information required by 43 CFR 3102.7 because, as he advised Erdmann, "there's obviously going to be more than one [filing] per parcel". (Appellants' Ex. No. 28, p. 72).

The personnel of the Wyoming State Office did not feel that they could compel Engle to revise his service agreement until their position had been sustained by the Interior Board of Land Appeals and they felt that the amendment and disclaimer proposal submitted by Engle and his attorney would solve the problem on an interim basis pending the appeals and possibly judicial review. (Appellants' Ex. No. 28, p. 91).

In a subsequent deposition, Erdmann testified as follows with respect to his conversations with Engle's attorney, Theuerkauf:

> A. * * * I explained that I was not counsel for the Department of the Interior; I explained that I could not speak for anybody except those people in the Wyoming State Office and as to what their inclinations were; that there was the possibility that further protests would be made; and that upon review at whatever level that the accommodation that we were making to his business needs might not withstand more authoritative examination. (Appellants' Ex. No. 28, pp. 117, 118)
>
> * * * * * * *
>
> A. * * * that I and the people in the Wyoming State Office, particularly the Branch of Land and Minerals Operations, were not happy with the idea of the accommodation we were coming to, but we felt that it would not be injurious to the public interest that the purposes of the regulations would be accomplished, but that I would -- that I was concerned and apprehensive that something might go awry with the thing. And that if he wanted to rely on that amendment and disclaimer, we weren't going to say no to it. But frankly, I didn't think it was a good idea; that we would prefer he rewrite his agreement this way. We thought that Mr. Engle ought to rewrite the service agreement the way we thought it ought to be written. (Appellants' Ex. No. 28, pp. 122, 123)

In his deposition, Theuerkauf explained his understanding of the conversations with Erdmann as follows:

> A. * * * He [Erdmann] at first thought that we should immediately file a -- start using or send out to everybody a new service agreement. So we told him what the problems were, and he was sympathetic to the problem of that, but he still thought that something had to be done.
>
> When we proposed this [the amendment and disclaimer], he said this was the solution. (Appellants' Ex. No. 25, p. 12)
>
> * * * * * * *
>
> Q. During the period beginning December of 1976 and concluding in March of 1978 when the Government approved the new service agreement, did any Government official ever tell you that the use of the amendment and disclaimer, Exhibit 2, would be risky?
>
> A. Never. (Appellants' Ex. No. 25, pp. 26, 27)
>
> * * * * * * *
>
> Q. And what did you do when you found out that a state office [New Mexico in March, 1978] had rejected the disclaimer?
>
> A. I called Mr. Erdmann and said, "What's going on, you know? We had this agreement. We've complied with the agreement, and so far up until today you complied with the agreement."
>
> Q. What was Mr. Erdmann's response?
>
> A. That was the first time that he told me that that agreement was only valid with the Cheyenne office of the Bureau of Land Management. (Appellants' Ex. No. 25, p. 29)
>
> * * * * * * *
>
> Q. I'm asking you, Mr. Theuerkauf, what you would have recommended to Mr. Engle in December of '76 or January of '77 had Mr. Erdmann expressed the qualifications he first expressed in March of '78.

> A. * * * And if we had any doubt that we weren't dealing with the Bureau of Land Management and that we had to go to * * * sixteen states, we would have very seriously considered another way.
>
> And, remember, at that time we were considering revision of the service agreement, we were considering the disclaimer and amendment and many other options that we had talked about. But if I had any idea that that would have jeopardized those 4,000 people, we certainly would have given more thought to another route. (Appellants' Ex. No. 25, pp. 30, 31)
>
> * * * * * * *
>
> A. * * * If on January 13th when I talked to Mr. Erdmann he had said, "Under no circumstances would we accept a disclaimer, that creates an interest and that's it and you've got to have a new service agreement," we probably would have done it, because at that point Mr. Engle was interested only in qualifying his clients.
>
> Now, they didn't say that, but if they would have, that's probably what we would have done. * * * (Appellants' Ex. No. 25, p. 54)

Pursuant to the arrangement reached with Erdmann, Engle executed the amendment and disclaimer document on January 13, 1977. It was received by the Wyoming State Office on or about January 18, 1977. (Tr. 66-68). This document recited that Engle "is a party to various contracts designated as service agreements with various customers for drawings"; that "it is possible that the Bureau of Land Management may opine that said exclusive agency, in fact, vests in the undersigned an interest in the lease or offer"; and that "it is the intention and desire of the undersigned to avoid any adverse consequences or delays which may result should the Bureau of Land Management adopt such an opinion". The document then stated that "I [Engle] do hereby waive and renounce any exclusive agency which I may have by reason of said service agreements with said offerors from and after this date"; that "said waiver and renunciation shall become operative forthwith and shall inure forthwith for the benefit of all said offerors"; and that "in the event a determination is made following the exhaustion of all administrative remedies and judicial remedies that said exclusive agency does not constitute an interest of the undersigned in said oil and gas leases, then and in that event this Amendment and Disclaimer

shall be null and void as if never executed". (Appellants' Ex. No. 2).

The recitals in Engle's amendment and disclaimer document are a clear recognition by Engle that the Wyoming State Office, which had already ruled that the exclusive agency provision did, in fact, create a prohibited interest in Engle in his clients' offers, was not the same as the Bureau of Land Management and did not speak for the Bureau of Land Management or the Department of the Interior. The recitals belie Engle's assertions that he believed he was dealing with the Bureau of Land Management, and not simply the Wyoming State Office, in arranging the amendment and disclaimer procedure.

On March 12, 1977, one Eugene R. Fischer filed protests with the Wyoming State Office against the issuance of six leases to clients of Engle that were winners in the January 1977 drawing. When informed of the protests, Theuerkauf sent a letter to Erdmann dated April 4, 1977, in which he (1) confirmed the filing of the amendment and disclaimer with the Wyoming State Office; (2) provided a copy of the form letter used by Engle which "communicates the disclaimer to the winner and permits him to do whatever he considers in his best interest with the lease without any commitment to Resource Service Company"; and (3) provided a copy of the agency contract used by Engle "to permit the winner to reinstate the sales agency terminated by the disclaimer if the winner chooses to do so". (Appellants' Ex. No. 18).

On April 12, 1977, the Wyoming State Office issued a decision over the signature of Glenna M. Lane, Chief, Oil and Gas Section, dismissing the Fischer protest. This decision stated:

> By agreement between this office and Mr. Fred Engle of the Resource Service Company, the objectionable portions of that company's service agreement have been eliminated. By amendment and disclaimer dated January 13, 1977, Mr. Engle has waived all rights to an exclusive agency to sell his clients' leases as set out in the original service agreement. Until he can put newly printed forms into use, Mr. Engle will notify any of his clients who are winners in our simultaneous drawings that they are not bound by the exclusive agency agreement. The clients so notified will be invited to execute new agreements if they desire to do so after they are notified of winning a drawing. This procedure will conform to our regulations. (Appellants' Ex. No. 5)

A copy of this decision was sent to Theuerkauf. The decision advised the protestant, Fischer, of his right of appeal to the Board of Land Appeals. No appeal was taken.

Donald W. Coyer, Engle's client, whose drawing entry card offer was drawn first for parcel No. 44 in the May 1977 monthly drawing conducted by the Wyoming State Office, has been employed as a police electronics technician for the City of Milwaukee for 24 years. Coyer responded to a newspaper advertisement placed by Engle and, as a result, executed a service agreement with Engle through his Resource Service Company on January 4, 1977. The agreement was the standard form agreement used by Engle between 1973 and 1978. (Tr. 27-28).

On May 9, 1977, Engle called Coyer to inform him that he had been a winner in the May 1977 drawing. Coyer met with Engle on that date (his first meeting with Engle) and Engle gave Coyer (1) a form letter dated May 9, 1977, addressed to Coyer; (2) a copy of the amendment and disclaimer; and (3) a new agency agreement. (Tr. 29-30). At that time, Coyer executed the new agency agreement which contained the same terms and conditions as the original service agreement with respect to the exclusive agency and Engle's right to share on a percentage basis in any cash price and royalty payments received by Coyer. The agreement did not, however, contain the provision that Engle would process up to 300 additional lease applications free of service fees if Coyer did not receive at least $10,000 gross on the sale of the lease. The form letter addresses to Coyer stated in part:

> We are in the process of working with the Bureau of Land Management in an effort to determine if the Sales Agreement portion of our Service Agreement presents a "sole party in interest" question. There has been a suggestion that this clause possibly gives an interest to us in our client's lease. * * * To remove <u>any</u> doubt that our clients are in fact the exclusive owners of their leases and to protect their best interests we have informed the Bureau that we do not consider this exclusive clause binding if it created an interest in us. The Bureau has suggested that if the Sales Agreement is signed <u>after</u> the drawing there is no question presented. (Appellants' Ex. No. 4)

Prior to his first meeting with Engle on May 9, 1977, Coyer did not know that Engle had executed the amendment and disclaimer document. Prior to that meeting, Coyer had not agreed to any modification of his contract with Engle and no consideration had been given for any contractual modification.

On July 15, 1977, Alfred L. Easterday, whose entry card offer was drawn second to the card submitted by Coyer for parcel No. 44, filed a protest with the Wyoming State Office against the issuance of the lease to Coyer. He contended that Coyer's service agreement with Engle invested Engle with an undisclosed interest in the offer and the lease if issued.

While Easterday's protest was pending before the Wyoming State Office, the Interior Board of Land Appeals, acting for the Secretary of the Interior pursuant to 43 CFR 4.1(b)(3), issued two decisions on Engle's appeals from the decisions of the Wyoming State Office rejecting three offers of Engle's clients that had been drawn first in the November 1976 drawing. Lola I. Doe, 31 IBLA 394 (August 19, 1977) and Sidney H. Schreter, et al., 32 IBLA 148 (September 12, 1977). The Board affirmed the decisions of the Wyoming State Office holding that Engle's service agreement created an interest in Engle in his clients' lease offers within the meaning of 43 CFR 3100.0-5(b) and, as a result, the interest should have been disclosed as required by 43 CFR 3102.7. Neither Engle nor his clients sought judicial review of the Board's decisions within the time period prescribed by 30 U.S.C. § 226-2 and 43 CFR 3100.0-9.

On October 25, 1977, the Wyoming State Office issued a decision over the signature of Glenna M. Lane, Chief, Oil and Gas Section, dismissing Easterday's protest. This decision stated:

> As you can read from the enclosed decision of the Interior Board of Land Appeals (IBLA), this office has successfully challenged the service agreement used by Mr. Fred Engle, dba Resource Service Company, who was Mr. Coyer's filing agent. However, in order to protect his clients during the IBLA consideration of his appeal from our decision challenging his service agreement, Mr. Engle submitted an amendment and disclaimer dated January 13, 1977, by which he waived all rights to an exclusive agency and agreed not to enforce the objectional [sic] portions of the service agreement calling for a percentage commission on all lease sales and royalties benefitting [sic] his clients. Mr. Engle has notified all of his clients who are winners in the simultaneous drawings to the effect that they are not bound by the objectionable provisions of the original service agreement. We are treating the objectionable provisions as if they have no effect because they will not be enforced.

> In the case at hand, Mr. Coyer executed a new agreement with Mr. Engle after being notified that he was a winner. The new agreement is nearly the same as the original service agreement, but the fact that it was executed after the publications of the winners' list removes all of our objections. (Appellants' Ex. No. 7)

The decision of the Wyoming State Office provided, pursuant to 43 CFR 4.410, that Easterday had the right of appeal to the Board of Land Appeals. It also provided that if an appeal was taken, Easterday was required to provide copies of his notice of appeal and statement of reasons to Coyer.

Easterday filed an appeal and pursuant to 43 CFR 4.413 served Coyer with copies of all documents filed in connection with the appeal. Engle was also aware of the appeal. Coyer did not participate, either individually or through Engle, in the proceedings on appeal. Coyer had the right and the opportunity to participate in the appeal under 43 CFR 4.414, which provides:

> If any party served with a notice of appeal wishes to participate in the proceedings on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. * * * The answer must state the reasons why the answerer thinks the appeal should not be sustained. * * *

If Coyer had participated in the appeal, he could have sought further proceedings under 43 CFR 4.415, which provides:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an administrative law judge for such a hearing. * * *

If Coyer had participated in the appeal and the Board had ordered a hearing, the case would have been in precisely the same posture as it is now, almost three years later, with the exception, that the issues would then have been ones of first impression.

Coyer testified that he discussed the Easterday appeal with Engle, but did not participate with Engle or his attorney, Theuerkauf, in deciding whether or not he would become involved in the appeal. Engle testified that they did not participate in the appeal because:

A. * * * it was 100 percent clearcut that that case would be affirmed by the IBLA in my mind. There was no question in my mind that they would affirm the local BLM's decision.

Q. You had been aware of and you were satisfied that you would get a favorable decision?

A. I was 100 percent sure that the government would honor the agreement that they had entered into with me, besides, the government was supposed to be representing his [Coyer's] interests to start with, which they failed to do so. (Tr. 141, 142)

On January 4, 1978, the Wyoming State Office wrote a letter to Engle pointing out that the time for seeking judicial review of the Board's decisions in Lola I. Doe, supra, and Sidney H. Schreter, et al., supra, had expired and insisting that Engle revise his service agreement to omit the objectionable provision that, in the interim period, had been deemed ineffective by the Wyoming State Office as a result of the amendment and disclaimer. (Appellants' Ex. No. 19). In March of 1978, a redrafted agreement was tendered and found acceptable. By a letter dated April 10, 1978, Engle transmitted the new agreements to his clients for their signature. The letter stated, in part, "[p]lease notice that the agreement to have us handle the sale of your lease, in the event you win, will now be optional". (Appellants' Ex. No. 32). It is difficult to understand this statement in view of Engle's insistence that his amendment and disclaimer document effectively eradicated, as of January 13, 1977, the exclusive agency provision in his service agreements and made it optional with the clients as to whether Engle would handle the sale of any lease won in a drawing.

In its decision on appeal, Alfred L. Easterday, 34 IBLA 195 (March 22, 1978), the Board of Land Appeals held, as it had in the previous cases involving Engle's service agreement, that Engle had an undisclosed interest in Coyer's offer. The Board also held that Engle's alleged waived or disclaimer of that interest was without effect as a matter of law and the original service agreement remained in effect as of the date of the drawing giving Engle a prohibited interest in the lease. The Board stated:

Engle's unilateral action did not alter the contractual obligations of the parties as they existed as of the date of the drawing. First, the waiver document was not communicated to Coyer until after the drawing, and

> a new agreement was not ratified by Coyer until after he was declared the winner for parcel No. 44. The waiver served notice to the BLM that RSC did not intend to enforce the objectionable provisions of the service agreement. However, without notice to, or an agreement with Coyer, Engle was not bound to carry out the terms of the alleged amendment. It is fundamental to the formation of a contract that there be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract. * * *
>
> Next, there was no consideration given to Engle by his client for his forbearance from enforcing his contractual rights. It is a fundamental legal requisite for the formation of an enforceable contract that legally sufficient consideration be given for a promise. (Appellants' Ex. No. 8)

The Board concluded that Coyer's offer was violative of 43 CFR 3102.7, which required Coyer to make a timely showing of Engle's interest in the offer and that there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because there was evidence that Engle "may have represented some 200 other client-offerors" under similar service agreements in the drawing for the one parcel. The Board reversed the decision of the Wyoming State Office and remanded the case for action consistent with its decision.

No evidence was presented at the hearing as to whether Engle did or did not, in fact, file other offer cards for other clients in the May 1977 drawing for parcel No. 44. The only satisfactory evidence on this subject consisted of Engle's testimony that:

> Q. * * * Is it your practice to file more than one card for more than one client in each drawing?
>
> A. It is a practice.
>
> Q. Is there any reason you have to doubt that you did it in this case?
>
> A. No, but if you want to be accurate, we could get the records on it instead of surmising. We had 5, 150.
>
> Q. Just more than one, that's what I want to know.

A. I would assume that we had more than one, but I really don't know. (Tr. 136)

On April 10, 1978, the Wyoming State Office issued a decision rejecting Coyer's lease offer. The decision advised Coyer that he had a right of appeal to the Board of Land Appeals and named Easterday as the adverse party to be served in the event of an appeal. Coyer filed an appeal to the Board. Easterday participated in the proceedings on appeal. In this appeal, Coyer contended (1) that the Government was estopped from penalizing Coyer because his agent, Engle, relied to his detriment on assurances and representations made by employees of the Wyoming State Office; (2) that Engle effectively waived any exclusive agency agreement with Coyer before he filed Coyer's offer with the Wyoming State Office; and (3) that the exclusive agency agreement did not, in any event, give Engle an interest in the lease within the meaning of 43 CFR 3112.5-2. Coyer also requested the Board to grant an evidentiary hearing to resolve all factual disputes.

On June 20, 1978, Coyer and Engle filed a complaint in the United States District Court for the District of Wyoming, Coyer, et al. v. Andrus, et al., Civil No. C 78-104, in order, among other things, to preserve their rights under 30 U.S.C. § 226-2 to appeal from the Board's decision of March 22, 1978, in the Easterday case.

On July 31, 1978, the Board issued its decision on Coyer's appeal. Coyer v. Easterday, 36 IBLA 181. In dismissing the appeal, the Board stated:

> Coyer's appeal is, in effect, an appeal of the decision of this Board in Easterday, involving the same parties, the same events, the same lease, and is before the same tribunal. Although it purports to be an appeal from the action of the Wyoming State Office in rejecting Coyer's lease offer, that action was merely the ministerial implementation of the Easterday decision, and carried no right of appeal to the Board. The decision of this Board is final for the Department, and no further appeal will lie in the Department. 43 CFR 4.21(c). Where an appeal has been taken and a final departmental decision has been reached, under the doctrine of administrative finality the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same parties, the same land and the same issues.
>
> * * * * * * *

> This appeal is clearly a manifestation of a case barred by the principle of res judicata, and must be dismissed for that reason. (Appellants' Ex. No. 9)

On October 30, 1978, Coyer and Engle appealed the Board's decision of July 31, 1978, in Coyer v. Easterday, supra, by the filing of a complaint and a petition for review in the United States District Court for the District of Wyoming. Coyer, et al. v. Andrus, et al., Civil No. C 78-213 and Coyer, et al. v. Andrus, et al., Civil No. C 78-214.

On February 12, 1979, the Court issued an order in Civil No. C 78-104, the action seeking review of the Board's decision of March 22, 1978, in the Easterday case. The Court stated, in part:

> * * * the Court having considered the argument of counsel and having fully and carefully reviewed the record on appeal, finds the following facts are not in dispute: plaintiff Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations (Lola I. Doe, 31 IBLA 394, August 19, 1977 and Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148, September 12, 1977); following these decisions Engle filed a disclaimer with the Wyoming State Office stating that any of his clients who might be awarded a lease would not be bound by the invalid agreement; the Wyoming State Office treated the objectionable parts of the agreement as if they had no effect.
>
> Plaintiff Coyer drew the first card, Easterday the second, and Roe the third; Coyer was awarded the lease by the Wyoming State Office; Easterday protested; his protest was dismissed by the Wyoming State Office; Easterday appealed to the IBLA; the IBLA reversed the decision of the Wyoming State Office, finding that the alleged disclaimer was without effect to bind the parties to it and remanded it to the Wyoming State Office; Coyer failed to appear or submit briefs on the appeal.
>
> Following the above actions, the Wyoming State Office rejected Coyer's priority status and awarded the lease to Easterday;

> Coyer was advised of his right of appeal to the IBLA; Coyer appealed to IBLA and his appeal was dismissed as being res judicata in the light of the earlier Easterday appeal and decision.
>
> Coyer instituted the present action in this Court for injunctive and declaratory relief, alleging arbitrary and capricious action on the part of the Secretary.
>
> * * * * * * *
>
> Taking the record as a whole, this Court finds the record is in such a state of confusion that an intelligent review is not possible, and the Court being fully advised in the premises; it is
>
> ORDERED that said matter be remanded to the Wyoming State Office where each of the parties will be given a full opportunity to appear in person and present such evidence as may be relevant to the interest of each.

Somewhere in the course of the proceedings, the administrative record was lost. It is not known whether the Court was aware of this fact when it issued its remand order.

On February 13, 1979, the Court dismissed without prejudice the other two actions, Civil Nos. C 78-213 and C 78-214, as being moot because of the remand to the Wyoming State Office "for a redetermination of the rights of the parties".

While the parties were attempting to arrive at a procedure to accommodate the Court's remand order, the Interior Board of Land Appeals issued a decision in Frederick W. Lowey, et al., 40 IBLA 381 (May 14, 1979). This case involved appeals by Engle and six of his clients whose drawing entry card offers were drawn first in monthly drawings conducted by the New Mexico State Office of the Bureau of Land Management between December 1977 and April 1978. The New Mexico State Office had rejected the winning offers because Engle, through his Resource Service Company and his service agreements, had an interest in the offers and the offerors failed to disclose the existence of the interest as required by 43 CFR 3102.7. The New Mexico State Office gave no effect to Engle's amendment and disclaimer which had been executed January 13, 1977 and filed with the New Mexico State Office on March 29, 1977, some three and one-half months after it was filed with the Wyoming State Office.

The Board of Land Appeals held, among other things, that (1) as was previously concluded in Lola I. Doe, supra, Sidney H. Schreter, et al., supra, and Alfred L. Easterday, supra, the standard form service agreement used by Engle in filing offers for clients in drawings gave Engle an interest in his clients' lease offers; and (2) as was previously concluded in Alfred L. Easterday, supra, Engle's amendment and disclaimer was without effect as a matter of law because there was no notice to, or any agreement with, the clients and there was no consideration to support the amendment and disclaimer. The Board expanded on its reasoning in the Easterday decision, cited various authorities in support of its position, and stated:

> In the instant case, appellants promised to pay, on a commission basis, for the service of having sales of their leases arranged, which service Engle promised to render. Engle's bare statement that he renounced his right to receive a commission for arranging the sale did not discharge his right to claim the commission, as it was not supported by any consideration. That is, his clients did not agree to assume any additional obligation or to renounce any right in return therefor. Engle's right to receive a commission from any sale of any lease won by appellants over 5 years, which he purportedly renounced, has not yet come due and is not such that it will become essentially different from that which his clients originally bargained to render. Thus, Engle may properly rescind his purported waiver and sue to claim a share of the proceeds of any sale of appellants' lease rights. Nor could Engle be estopped from retracting his disclaimer, because his clients obviously could not have relied on his making the disclaimer, as he did not notify them that he had made it. * * *
>
> * * * * * * *
>
> Appellants would have us hold that Engle's unilateral waiver, made without consideration and without notification to his clients until after their cards were drawn, effectively erased his interest in their offers. Were we to do so, we would establish a precedent which would allow open flaunting of the prohibition against multiple filings of 43 CFR 3112.5-2, as in this hypothetical situation: * * * [where a leasing service

> operates as Engle had and the amendment and disclaimer is held effective and a lease issued and then] The client, thinking that the service demands too high a commission, declines to renew his exclusive sales agency with the service, and instead sells the lease himself to a bona fide purchaser for a large return. The service rescinds its waiver of the sales agreement and sues its client, demanding its share of those proceeds, which, as discussed above, it would be legally entitled to recover * * * [at that time it would be] too late for the Department to take corrective action, * * * [and] the Department would be foreclosed from preventing a flagrant abuse of the lottery system by a leasing service.

In the Lowey case, the appellants contended that notwithstanding the legal ineffectiveness of the disclaimer, the Department was estopped from rejecting the lease offers because (1) the Wyoming State Office gave its approval to Engle's procedure of filing a disclaimer which was unsupported by consideration and of notifying clients of the disclaimer only after they were winners; and (2) Engle relied on this approval and did not prepare new agreements which could have avoided any problems. In ruling on this argument, the Board stated:

> * * * Even disregarding 43 CFR 1810.3, which provides that the United States is not bound by the acts of its officers and agents, we have concluded that this matter is not appropriate for the extraordinary relief of equitable estoppel.

The Board then gave the following review of the circumstances:

> [Personnel at the Wyoming State Office] informed Engle that he would have to revise his contracts with his clients or face the possible rejection of his clients' offers in cases where Engle's interest was undisclosed. Engle refused to submit revised contracts to his clients, contending that Wyoming BLM was in error in its finding that he had an interest in his clients' offers and leases issued pursuant thereto. He argued that it would be burdensome to contact each of his clients and get revised contracts executed, and that it would be unfair to require this of him, particularly if it were ultimately held that Wyoming BLM

was in error and the existing contracts were perfectly proper.

> Instead, as an interim measure, he prevailed upon Wyoming BLM to accept his "Amendment and Disclaimer" pending a final determination of the question by this Board or, perhaps, by the courts. Although the personnel at Wyoming BLM (erroneously) allowed themselves to be persuaded to make this accommodation to Engle, contrary to their own holding in the matter, they expressly warned Engle and/or his attorney (1) that the use of the "Amendment and Disclaimer" would be "risky," but would avoid rejections by the Wyoming State Office until a final, authoritative decision could be made; (2) that they, as employees of the Wyoming State Office of BLM, could not commit the Department to acceptance of the "Amendment and Disclaimer," and could not anticipate what might happen at the appeal stages; (3) that other state offices of BLM might reject the offers filed by Engle's clients; and (4) that Engle was taking a risk in not immediately revising its [sic] "Service Agreement" with his clients. The only assurances given either to Engle or his attorney were that the Wyoming State Office would accept the "Amendment and Disclaimer" on an interim basis and refrain from rejecting the offers of his clients until the matter was finally resolved.

The Board concluded:

> There is nothing in these events which could give rise to an equitable estoppel against the Government. The fact that certain employees in one BLM state office attempted to make some temporary accommodation in Engle's interest, while warning him that it would be risky, and that they were without power to determine what would be decided by the Department or other BLM offices, certainly was not a misrepresentation of any material fact, nor did it afford grounds for Engle's reliance, nor did it constitute "affirmative misconduct". Engle was fully informed of every aspect of the matter, and actually was adamant in his refusal to take the one course urged upon him by Wyoming BLM

which would have extricated him -- and his clients -- from the difficulty.

The Board's decision in the Lowey case is presently before the United States District Court for the District of Columbia for judicial review. Lowey, et al. v. Andrus, et al., C.A. 79-3314-79-3319.

On June 19, 1979, the Board of Land Appeals issued an order in an attempt to comply with the Court's remand order of February 12, 1979. The Board construed the Court's remand to the Wyoming State Office as remanding the matter to the Board. It explained this construction as follows:

> The reference to the Wyoming State Office (of the Bureau of Land Management) has engendered some confusion. Although the case originated there, as the consequence of the conflicting simultaneous oil and gas lease offers of Messrs. Coyer and Easterday, it is the decisions of this Board which are at issue. The Board of Land Appeals is a component of the Office of Hearings and Appeals, an adjunct of the Office of the Secretary of the Interior, with authority to hear, consider, and determine, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings and appeals and other review functions of the Secretary. 43 CFR 4.1. The Wyoming State Office, being a field office of a subordinate bureau of the Department, is not empowered to make findings or conclusions contrary to the final decisions of this Board.

The Board then stated:

> * * * a hearing will be ordered, to be conducted by an administrative law judge, at which the plaintiffs to the judicial litigation will be required to plead and prove reversible error in the decisions rendered by this Board in disposing of the respective appeals of Easterday and Coyer. * * *
>
> * * * the matter is hereby referred to the Hearings Division for assignment to an administrative law judge who will conduct a hearing pursuant to 43 CFR 4.415 for the reception of evidence on any relevant issues of disputed fact, and to hear all arguments

> of fact and law. He will inquire into and resolve issues relating to the administrative record which reportedly has been lost, and make provision for the authentication of any reconstructed record offered in substitution therefor. Upon conclusion of the proceeding he will make proposed findings and conclusions for submission to this Board in accordance with 43 CFR 4.433.

On August 14, 1979, Coyer and Engle filed a motion with the United States District Court for the District of Wyoming in C 78-104 requesting an order, among other things, directing the Board of Land Appeals to withdraw its order dated June 19, 1979, and directing that during the hearing mandated by the Court, Easterday shall have the burden of proving that Coyer is not entitled to the lease in question.

By an order dated August 31, 1979, the Court amended nunc pro tunc the last paragraph of its February 12, 1979 order quoted above to read essentially the same as the last paragraph of the Board's order of June 19, 1979 quoted above. The Court's order did not, however, contain any references to 43 CFR 4.415 or 43 CFR 4.433.

A prehearing conference was held on October 12, 1979, Coyer and Engle pursued prehearing discovery proceedings, and a hearing was held on February 12, 1980, at which all parties were given a full opportunity to present such evidence as might be relevant to their interests. Extensive posthearing briefs and proposed findings and conclusions have been submitted.

The lost administrative record was found and received in evidence. No definite conclusions can be reached as to whether it contains precisely the same material that was before the Board when it considered the Easterday and Coyer appeals. Such a conclusion is not, however, of any consequence since the parties have presented all evidence deemed relevant to their respective positions.